IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

HARRISON FRANKLIN,

Plaintiff, OPINION AND ORDER

v. 12-cv-825-wmc

WARDEN MICHAEL MEISNER,

Defendant.

State inmate Harrison Franklin has filed petition for a writ of mandamus, seeking his immediate release from state prison. Franklin also seeks leave to proceed *in forma pauperis*. After considering the petition and court records reflecting Franklin's repeated, unsuccessful attempts to attack his underlying state conviction, the court denies leave to proceed and dismisses this case for reasons set forth below.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant's complaint, the court must read the allegations generously. *See Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court accepts plaintiff's well-pleaded allegations as true and assumes the following probative facts:[1]

In 1996, Franklin was convicted of first-degree reckless endangerment, armed robbery and bail jumping as a habitual offender in Kenosha County Case No. 96CF126.

[1] The court has supplemented the facts with dates and procedural information about plaintiff's underlying state court conviction from the electronic docket available at Wisconsin Circuit Court Access, http://wcca.wicourts.gov (last visited April 23, 2013).

After exhausting his appellate remedies in state court, Franklin challenged that conviction by seeking a federal writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Wisconsin. The district court (the Honorable William C. Griesbach) denied Franklin's petition for habeas relief and dismissed the case. *See Franklin v. McCaughtry*, 02-cv-278-wcg (E.D. Wis. Dec. 19, 2002). The United States Court of Appeals for the Seventh Circuit vacated that order on February 24, 2005, and remanded the case with instructions to grant the petition "unless the state initiate[d] proceedings to re-try [Franklin] within 60 days." *Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005).

State court records show that Franklin was re-tried in Kenosha County Case No. 96CF126 and convicted on July 14, 2005. On direct appeal, Franklin argued that this conviction should also be set aside because he was not re-tried within 60 days of the Seventh Circuit's decision. The Wisconsin Court of Appeals rejected this argument, observing that the state "initiated proceedings" against Franklin within the 60-day deadline and that trial was delayed after newly-appointed defense counsel requested additional time to prepare. *See State v. Franklin*, 2008 WI App 64, 311 Wis.2d 489, 750 N.W.2d 518 (March 19, 2008). The Wisconsin Supreme Court denied Franklin's petition for review of that decision.

Franklin challenged his 2005 conviction by filing a new federal habeas corpus proceeding under 28 U.S.C. § 2254 in the Eastern District of Wisconsin. In that proceeding, Franklin renewed his argument that he was denied a "speedy trial," because he was not re-tried within 60 days of the Seventh Circuit's decision. The Honorable

Patricia J. Gorence denied that petition after finding that Franklin failed to demonstrate a constitutional violation or state a valid claim for relief. *See Franklin v. Bartow*, 09-cv-664-pjg (E.D. Wis. Dec. 18, 2009). The Seventh Circuit affirmed that decision by denying a certificate of appealability. *See Franklin v. Bartow*, No. 10-1265 (7th Cir. June 22, 2010).

Undeterred, Franklin returned to Judge Griesbach and requested a writ of mandamus, arguing his 2005 conviction was invalid because the state did not re-try him within 60 days of the Seventh Circuit's decision. Noting that Judge Gorence had rejected this claim already, Judge Griesbach dismissed the petition as barred by the rule restricting successive application for habeas relief. *See Franklin v. McCaughtry*, 02-cv-278-wcg, 2012 WL 112278 (E.D. Wis. Jan. 12, 2012) (citing 28 U.S.C. § 2244(b)). In addition, Judge Griesbach observed that the state had clearly satisfied the Seventh Circuit's order on remand by initiating proceedings to retry Franklin within the 60-day deadline. Thus, he found that Franklin's claim was without merit.

While Franklin chose not to appeal from that decision, he has now filed yet another petition for a writ of mandamus in this court, purporting to raise again claims similar to those previously rejected in state and federal courts. This time Franklin invokes Fed. R. Crim. P. 42(b) and seeks a writ of mandamus to hold the state in "criminal contempt" for failing to retry him in Kenosha County Case No. 96CF126 within 60 days of the Seventh Circuit's decision. Franklin also requests an order directing the defendant, Warden Michael Meisner, to release him from state custody.

OPINION

As an initial matter, Fed. R. Crim. P. 42(b) provides that a court may summarily punish any person who "commits criminal contempt in [the court's presence] if the judge saw or heard the contemptuous conduct and so certifies." Because the proceedings at issue did not occur before this court, Fed. R. Crim. P. 42(b) does not apply. Franklin has, therefore, articulated no valid basis for this court's exercise of jurisdiction over his repetitive claims.[2]

To the extent that Franklin seeks a writ of mandamus, the governing statute conveys only limited jurisdiction or authority "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The federal mandamus statute also does not apply here because the defendant is a state actor, not an officer or employee of the United States. In that respect, too, a federal district court lacks "jurisdiction to issue a [writ of] mandamus against state officials for violating their duties under state law." *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 469 (7th Cir. 1988); *see also Davis v. Lansing*, 851 F.2d 72, 74 (2d Cir. 1988); *Van Sickle v. Holloway*, 791 F.2d 1431, 1436 n.5 (10th Cir. 1986); *Moye v. Clerk, DeKalb County Superior Court*, 474 F.2d 1275, 1275-76 (5th Cir. 1973); *Haggard v. State of Tenn.*, 421 F.2d 1384, 1386 (6th Cir. 1970). Therefore, § 1361 also provides no

[2] Although Franklin includes a request for damages, the pleadings submitted are not construed as governed by 42 U.S.C. § 1983 or the Prison Litigation Reform Act (the "PLRA"), 28 U.S.C. § 1915(b), which requires that indigent inmates initiating "civil actions and appeals" pay the filing fee in incremental installments. Where a prisoner's mandamus petition concerns a criminal proceeding, a petition for collateral review or a motion for post-conviction relief, the PLRA and its filing-fee provisions do not apply. *See Martin v. United States*, 96 F.3d 853 (7th Cir. 1996); *see also In re Stone*, 118 F.3d 1032, 1034 (5th Cir. 1997).

valid basis for jurisdiction.

Finally, to the extent that Franklin seeks his immediate release from state custody, his claims are governed by the federal habeas corpus statutes. For the same reasons outlined in Judge Griesbach's most recent decision in this matter, Franklin's petition is also barred as a second or successive application for habeas relief. *See* 28 U.S.C. § 2244(b).[3] More importantly, because the issues raised by Franklin have been decided previously, the pending petition is subject to dismissal with prejudice as an abuse of the writ. *See Morales v. Bezy*, 499 F.3d 668, 672 (7th Cir. 2007); *Taylor v. Gilkey*, 314 F.3d 832, 834-35 (7th Cir. 2002).

ORDER

IT IS ORDERED that Plaintiff Harrison Franklin's request for leave to proceed *in forma pauperis* is DENIED and his petition for a writ of mandamus is DISMISSED with prejudice as an abuse of the writ.

Entered this 15th day of May, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge

[3] The fact that Franklin labels his petition as one arising under the federal mandamus statute is of no moment. A petitioner cannot avoid restrictions on habeas review by "inventive captioning." *Melton v. United States*, 359 F.3d 855, 857 (7th Cir. 2004) ("Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita querela, certiorari, capias, habeas corpus, ejectment, quare impedit, bill of review, writ of error, or an application for a Get-Out-of-Jail-[Free] Card; the name makes no difference. It is substance that controls.") (citing *Thurman v. Gramley*, 97 F.3d 185, 186-87 (7th Cir. 1996)).